A

DR KOAY CHENG BOON

v.

THE MALAYSIAN MEDICAL COUNCIL

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KANG HWEE GEE JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02-393-2009]

C

7 APRIL 2011

CONSTITUTIONAL LAW: *Courts - Appeals - Jurisdiction of Court of Appeal to hear appeals - Unqualified jurisdiction conferred by art. 121(1B) Federal Constitution - Whether legislation limiting appeals*

D

to Court of Appeal rendered null and void by virtue of art. 121(1B) - Whether s. 31(2) Medical Act 1971 providing High Court decision as final upon appeal contravened art. 121(1B) - Whether appellant had right of appeal to Court of Appeal - Yong Teck Lee v. Harris Mohd Salleh & Anor - Tan Sri Eric Chia Eng Hock v. PP - Courts of Judicature

E

Act 1964, s. 68(1)(d)

CONSTITUTIONAL LAW: *Courts - Appeals - Jurisdiction of Federal Court to hear appeals - Unqualified jurisdiction conferred by art. 121(2)(a) Federal Constitution - Whether art. 128(3) of same limiting*

F

and qualifying general power conferred by art. 121(2)(a) - Whether art. 128(3) to be construed as proviso to art. 121(2)(a) - Interpretation of "proviso" in Tan Sri Eric Chia Eng Hock v. PP

PROFESSIONS: *Medical practitioners - Dismissal of appeal against findings of Medical Council by High Court - Whether appellant had right*

G

of appeal to Court of Appeal - Whether s. 31(2) Medical Act 1971 rendered null and void by virtue of art. 121(1B) Federal Constitution - Yong Teck Lee v. Harris Mohd Salleh & Anor - Tan Sri Eric Chia Eng Hock v. PP

H

WORDS & PHRASES: *"proviso" - Meaning and application of - Article 121(2)(a) and art. 128(3) Federal Constitution - Interpretation given by Federal Court in Tan Sri Eric Chia Eng Hock v. PP - Whether art. 128(3) limiting appeals to Federal Court to be construed as proviso to general power contained in art. 121(1B)*

I

The High Court dismissed the appellant's appeal against the findings of the Malaysian Medical Council (the respondent herein) against him. The appellant appealed to this court and a preliminary point was raised in respect of his right of appeal herein. The issue pertained to s. 31(2) of the Medical Act 1971 ('Medical Act') which provided that the decision of the High Court on appeal was final and therefore non-appealable. Section 68(1)(d) of the Courts of Judicature Act 1964 was said to give effect to s. 31(2) of the Medical Act. The appellant argued that s. 31(2) was contrary to art. 121 (1B) of the Federal Constitution ('Constitution') which conferred the Court of Appeal an unqualified jurisdiction to hear appeals. The appellant urged the court to reconsider the reasoning of the majority decision in *Yong Teck Lee v. Harris Mohd Salleh & Anor* in light of the Federal Court decision in *Tan Sri Eric Chia Eng Hock v. PP*. It was submitted that the Federal Court in the latter case decided that the unqualified jurisdiction of the Federal Court to hear appeals conferred by art. 121(2) of the Constitution should be construed as a proviso to art. 128(3) of the same which limited and qualified the appeals.

Held (dismissing the appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The appellant's argument that art. 121(2) of the Constitution should be construed as a proviso to art. 128(3) of the same on the authority of *Tan Sri Eric Chia Eng Hock v. PP*, was flawed. Based on the extensive exposition on the meaning and application of the word "proviso" in that case, art. 128(3) should be construed as a proviso to art. 121(2). In that case the constitutionality of s. 87 of the Courts of Judicature Act 1964 could not be impugned because based on the authority of both arts. 121(2)(a) and 128(3) read together, s. 87 was a federal law enacted to confer jurisdiction on the Federal Court to determine appeals. The appellant's further argument that the accused in that case would have succeeded in arguing that s. 87 was void by virtue of art. 121(2) if not for the proviso of art. 128(3), was mere speculation. There was no direct support for that argument in that case. As that case was only cited in support for the purpose of the said argument, it therefore provided no further assistance to the present case. (paras 11-13)

(2) The question was whether Parliament, by introducing art. 121(1B) of the Constitution, intended to declare null and void legislation that previously limited appeals from decisions of the High Court. By the decision in *Yong Teck Lee v. Harris Mohd Salleh & Anor*, Parliament did not so intend. That decision stood since 2001. (para 18)

(3) Courts must not lightly change the course or direction on an interpretation of law. The application of the principle of *stare decisis* was not confined only to cases of a superior court binding on a lower court but extended to decisions of the same court as more persuasive if not binding and to be departed only if there were compelling reasons. (para 19)

(4) The appellant's submissions essentially repeated the arguments dealt with in *Yong Teck Lee v. Harris Mohd Salleh & Anor* and provided no compelling reasons to depart from the decision made therein. (para 20)

(5) The basic proposition enunciated by the Federal Court in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* remained applicable, *ie*, that "... court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies". (*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor; Gan Joon Zin v. Fong Kui Lun & Ors; PP v. Ottavio Quattrocchi; Majlis Perubatan Malaysia v. Dr Ravindran Jegasothy*; refd). (paras 21 & 23)

(6) On the authority of *Yong Teck Lee v. Harris Mohd Salleh & Anor*, s. 31(2) of the Medical Act 1971 was not rendered null and void by virtue of art. 121(1B) of the Constitution. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Mahkamah Tinggi telah menolak rayuan perayu terhadap keputusan Majlis Perubatan Malaysia (responden di sini) terhadapnya. Perayu telah merayu kepada mahkamah ini dan satu persoalan awalan telah dibangkitkan berkenaan dengan hak perayu untuk membuat rayuan ini. Isu tersebut berkaitan dengan s. 31(2) Akta Perubatan 1971 ('Akta Perubatan') yang memperuntukkan

bahawa apabila rayuan dibuat kepada Mahkamah Tinggi, keputusannya adalah muktamad dan rayuan tidak boleh dibuat terhadap keputusan tersebut. Seksyen 68(1)(d) Akta Mahkamah Kehakiman 1964 dikatakan memberi kesan kepada s. 31(2) Akta Perubatan. Pihak perayu berhujah bahawa s. 31(2) adalah bertentangan dengan per. 121(B) Perlembagaan Persekutuan ('Perlembagaan') yang memberikan Mahkamah Rayuan bidangkuasa yang tidak bersyarat untuk mendengar rayuan. Pihak perayu memohon untuk mahkamah mempertimbangkan semula keputusan majoriti di dalam kes *Yong Teck v. Harris Mohd Salleh & Anor* berdasarkan keputusan Mahkamah Persekutuan di dalam kes *Tan Sri Eric Chia Eng Hock v. PP*. Adalah dihujahkan bahawa Mahkamah Persekutuan di dalam kes terkemudian itu telah memutuskan bahawa bidangkuasa yang tidak bersyarat Mahkamah Persekutuan untuk mendengar rayuan yang diberikan oleh per. 121(2) Perlembagaan seharusnya ditafsirkan sebagai proviso kepada per. 128(3) yang sama yang menghadkan rayuan-rayuan.

Diputuskan (menolak rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Hujahan pihak perayu bahawa per. 121(2) Perlembagaan seharusnya ditafsirkan sebagai proviso kepada per. 128(3) Perlembagaan atas otoriti *Tan Sri Eric Chia Hock v. PP*, adalah cacat/tidak tepat. Berdasarkan "exposition" yang luas tentang makna dan penggunaan perkataan "proviso" dalam kes tersebut, per. 128(3) sepatutnya ditafsirkan sebagai proviso kepada per. 121(2). Di dalam kes tersebut, keperlembagaan s. 87 Akta Mahkamah Kehakiman 1964, tidak dapat dipersoalkan kerana berdasarkan otoriti, kedua-dua per. 121(2)(a) dan 128(3) dibaca bersama dengan s. 87 merupakan undang-undang persekutuan yang digubal untuk memberi bidangkuasa kepada Mahkamah Persekutuan untuk mendengar dan memutuskan rayuan. Seterusnya, hujahan perayu bahawa si tertuduh di dalam kes itu kemungkinan berjaya dalam hujahannya bahawa s. 87 terbatal disebabkan per. 121(2) sekiranya proviso per. 128(3) tidak wujud, merupakan spekulasi semata-mata. Tiada sokongan secara terus untuk hujahan tersebut di dalam kes itu. Oleh kerana kes tersebut hanya disebut untuk menyokong hujahan tersebut, ianya tidak memberikan sebarang pertolongan di dalam kes ini.

(2) Persoalannya adalah sama ada Parlimen, dengan memperkenalkan per. 121(1B) Perlembagaan, bertujuan untuk menjadikan undang-undang yang sebelum ini menghadkan rayuan daripada keputusan Mahkamah Tinggi, sebagai batal dan tidak sah. Mengikut keputusan di dalam kes *Yong Teck Lee v. Harris Mohd Salleh & Anor*, Parlimen tidak mempunyai tujuan sedemikian. Keputusan tersebut wujud semenjak tahun 2001.

(3) Mahkamah tidak seharusnya mengubah arah atau tujuan undang-undang dengan menggunakan interpretasi undang-undang, secara mudah. Penggunaan prinsip *stare decisis* tidak hanya terhad kepada kes-kes di mahkamah yang lebih tinggi yang mengikat mahkamah yang lebih rendah malahan merangkumi keputusan-keputusan mahkamah yang sama taraf sebagai lebih berpengaruh walaupun tidak mengikat dan hanya boleh diabaikan sekiranya terdapat sebab-sebab yang kukuh.

(4) Hujahan perayu secara asas mengulangi semula hujahan yang telah ditangani di dalam kes *Yong Teck Lee v. Harris Mohd Salleh & Anor* dan hujahannya tidak mengemukakan alasan yang kukuh untuk tidak menggunapakai keputusan yang telah dibuat di dalam kes tersebut.

(5) Proposisi asas yang diucapkan oleh Mahkamah Persekutuan di dalam kes *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* masih terpakai, yakni, bahawa "... court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies". (*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor; Gan Joon Zin v. Fong Kui Lun & Ors; PP v. Ottavio Quattrocchi; Majlis Perubatan Malaysia v. Dr Ravindran Jegasothy*; dirujuk)

(6) Mengikut otoriti *Yong Teck Lee v. Harris Mohd Salleh & Anor*, s. 31(2) Akta Perubatan 1971 tidak terbatal dan tidak tak sah disebabkan per. 121(1B) Perlembagaan.

Case(s) referred to:
Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***
Gan Joon Zin v. Fong Kui Lun & Ors [2004] 4 CLJ 729 FC ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***
PP v. Ottavio Quattrocchi [2004] 3 CLJ 553 FC ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Yong Teck Lee v. Harris Mohd Salleh & Anor [2002] 3 CLJ 422 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 68(1)(d), 87
Election Offences Act 1954, s. 36
Federal Constitution, arts. 4(1), 121(1B)(a), (b), (2)(a), 128(3)
Medical Act 1971, s. 31(2)

For the appellant - S Ravindran; M/s Sreenevasan Young
For the respondent - Harjinder Kaur; M/s Shahrizat Rashid & Lee

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail JCA:

[1] Dissatisfied with the dismissal by the High Court of his appeal to it against the findings against him by the Malaysian Medical Council, the Appellant Dr. Koay Cheng Boon appealed to this court.

Court Of Judicature Act And The Medical Act

[2] At the hearing, the parties informed us they wished to address a preliminary point in respect of the right of the appellant to appeal to this court. That issue pertains to s. 31(2) of the Medical Act 1971 (Act 50) which in providing that any person who is aggrieved by any order made in respect of him by the Council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and the High Court may thereupon make orders to affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper, and award costs of the appeal at its discretion, contained a limitation as follows:

(2) The decision of the High Court upon such appeal shall be final.

[3] Section 68(1)(d) of the Courts of Judicature Act 1964 (Act 91) provides in respect of non-appealable matters that:

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> ...
>
> (d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

[4] On the face of it, s. 68(1)(d) of Act 91 gives effect to ss. 31(2) of Act and bars the appellant from appealing to this court.

The Federal Constitution

[5] Counsel for the appellant seeks to persuade this court that s. 31(2) is contrary to art. 121(1B) of the Federal Constitution of Malaysia, and therefore null and void, and that accordingly the appellant has a right to appeal to the Court of Appeal.

[6] The said article provides:

> Art 121(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
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> [Am. Act A1260]
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> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) **such other jurisdiction** as may be conferred by or under federal law.

[7] The same argument as to the right of appeal from the decision of the election judge under the Elections Act 1958 (Revised 1970) Act 19 was dealt with in *Yong Teck Lee v. Harris Mohd Salleh & Anor* [2002] 3 CLJ 422 CA. In that case, it was argued that s. 36 of the Election Offences Act 1954 insofar as it purports to exclude the jurisdiction of the Court of Appeal to hear

an appeal from a final order of an election judge, is void and of no effect by operation of art. 4(1), it being inconsistent with art. 121(1B)(a) of the Constitution. The argument was rejected by a majority decision.

[8] Counsel nevertheless implored this court to reconsider the reasoning of the majority decision in this case with regard to s. 31(2) of the Medical Act in the light of the decision of the Federal Court in *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565 FC.

[9] It was submitted in the written submission for the appellant that:

> 17. ... Augustine Paul FCJ, who wrote the judgment of the court on this issue, held that the unqualified jurisdiction conferred by Art 121(2) was to be read subject to Art 128(3), which was construed as a proviso to Art 128(3). ...

[10] The word proviso was written in bold and underlined. However, in an extensive exposition on the meaning and application of the word "proviso", the learned Augustine Paul FCJ held in that case:

> [13] As art. 128(3) is a limitation and qualification upon the general power contained in art. 121(2)(a) it must therefore be construed as a proviso to art. 121(2)(a). Accordingly, when art. 128(3) is read as a proviso to art. 121(2)(a) the jurisdiction of the Federal Court to determine appeals shall be such as may be provided by Federal law. This approach will give a harmonious interpretation to art. 121(2)(a) and art. 128(3) and will not affect the validity of either one of them. ...

[11] Counsel's argument in the written submission is, therefore, flawed. What was held was that art. 128(3) is to be read as a proviso to art. 121(2). Accordingly, it was held in that case that the constitutionality of s. 87 cannot be impugned because it is a federal law enacted to confer jurisdiction on the Federal Court to determine appeals on the authority of arts. 121(2)(a) and 128(3) read together.

[12] Undaunted, counsel for the appellant submitted:

> 18. What is implicit in this decision is that but for the proviso of Art 128(3), the accused would have succeeded in arguing that s. 87 CJA was void *vis-a-vis* Art 121(2).

[13] We find while nothing could stop that speculation but for the proviso of art. 128(3), the argument that s. 87 of the Courts of Judicature Act was void would have succeeded, there is essentially no direct support for it and therefore there is no merit in it. We also note that the case of *Tan Sri Eric Chia Eng Hock v. PP (supra)* was raised only for the purpose of the above argument, and provides no further assistance to the present case.

[14] The submission for the appellant then continued in the same paragraph as follows:

> 18. ... When viewed in light of this decision, it is plain that Abdul Hamid Mohamad JCA, with respect, erred when he treated Art 128(3) as superfluous.

[15] To succeed it may be thought necessary to argue that the learned judge had treated art. 128(3) as superfluous. But since every judge in Malaysia is sworn to "preserve, protect and defend its Constitution", such an argument is indeed a serious accusation. Abdul Hamid Mohamed JCA (as he then was), as counsel reproduced in his written submissions, had said:

> ... With respect, I do not think that art. 121(1B), even in the absence of a provision similar to art. 128(3), being a general provision, can be read in such a restrictive way.

[16] Three paragraphs before that, the learned judge has explained he referred to *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd.* [2002] 1 CLJ 645 (FC) for the reason that art. 121(2) that the case was referring to is in *pari materia* with art. 121(1B). Then his Lordship had said:

> In this connection, it is argued that vesting of the jurisdiction by the Constitution in the Court of Appeal to hear appeals from the High Court cannot be detracted, limited or restricted by a federal law, even though federal law may regulate it. Examples of such "regulations" are the requirement to file notice of appeal and the requirement to obtain leave in certain cases.
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> I have no problem with the first example. But, there is clearly a problem in respect of the requirement to obtain leave. Leave may be granted or refused. When leave is refused, following this argument, does it not mean that a constitutional right has been refused in the exercise of a federal law? It is the federal law, ie, the Courts of Judicature Act 1964 that provides for such

requirements, not the Constitution. This, to my mind, shows that the provision of the Constitution should be read together with the provisions of the Courts of Judicature Act 1964. To hold otherwise would lead to a conclusion that even ss. 50, 67 and 68 of the Courts of Judicature Act 1964 are void and unconstitutional. It means that all decisions of the High Court are appealable to the Court of Appeal. With respect, I do not think that art. 121(1B), even in the absence of a provision similar to art. 128(3), being a general provision, can be read in such a restrictive way.

[17] We find no basis to say the learned judge has considered art. 128(3) superfluous. The reasoning in the judgment cannot be dismissed merely by such glib labelling. To succeed in a submission upon or against a reasoning, counsel must address the reasoning and seek to persuade the court that the reasoning is either sound or flawed respectively. We are not persuaded that counsel had done so.

[18] The key reasoning accepted in the minority judgment by KC Vohrah JCA is that the lack of an equivalent to art. 128(3) in respect of the Court of Appeal means that unlike the case of appeals to the Federal Court, all decisions of the High Court are appealable to the Court of Appeal for the reason that the primary jurisdiction conferred under art. 121(1B)(a) upon the Court of Appeal is to hear appeals from decisions of the High Court or of a judge thereof and while the primary jurisdiction may be enlarged by virtue of art. 121(1B)(b) it is not to be abrogated, limited or restricted and any attempt to abrogate, limit or restrict the primary jurisdiction is void for inconsistency under art. 4(1) of the Constitution. The difference lay in the fact the majority judgment took into consideration the established law with regard to decisions of the election judge sitting in the High Court, while the minority view is that decisions based on law prior to the introduction of art. 121(1B) are not applicable. Needless to say the interpretation applied by the minority would open the doors to appeals not only against decisions of election judges but also of Judges of the High Court by declaring null and void legislation that previously limited appeals from decisions of the High Court. The question is whether Parliament did so intend when art. 121(1B) was introduced.

[19] We find that in *Yong Teck Lee v. Harris Mohd Salleh & Anor (supra)*, this court decision that Parliament did not so intend. That decision stood since 2001. Courts must not lightly change the course or direction on an interpretation of law. The application of the principle of *stare decisis* is not confined only to cases of a superior court being binding upon a lower court, but extends to decisions of the same court as being more that persuasive even if not binding, to be departed from only if there are compelling reasons. To do otherwise would introduce uncertainty, which is not only undesirable in itself, but it opens the way where everyone who wished to do so can try their luck by commencing proceedings.

[20] The submissions before us essentially repeated the arguments dealt with in *Yong Teck Lee v. Harris Mohd Salleh & Anor (supra)* and, as explained above, provided no compelling reasons to depart from the decision made therein.

[21] In our view, the basic proposition enunciated clearly by the Federal Court in *Auto Dunia Sdn. Bhd. v Wong Sai Fatt & Ors.* [1995] 3 CLJ 485 FC, remains applicable:

> It is an elementary proposition that this court is a creature of Statute and that equally a right of appeal is also a creature of Statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

[22] See also *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 FC; *Gan Joon Zin v. Fong Kui Lun & Ors* [2004] 4 CLJ 729 FC; *PP v. Ottavio Quattrocchi* [2004] 3 CLJ 553 FC.

[23] In *Majlis Perubatan Malaysia v. Dr Ravindran a/l Jegasothy* W-02-1754-2009, this court allowed a notice of motion by the respondent to strike out an appeal by the appellant on this very ground. No occasion appear to have arisen for grounds of judgment to be written. An application 08-73-2010(W) to the Federal Court by applicant appellant Majlis Perubatan Malaysia for leave to appeal to the Federal Court was on 30 June 2010 struck out when an application by the respondent Dr. Ravindran to dismiss the application was allowed.

[24] We therefore applied *Yong Teck Lee v. Harris Mohd Salleh & Anor (supra)* and held that s. 31(2) of the Medical Act is not rendered null and void as being contrary to art. 121(1B). The appeal was, therefore, dismissed with costs.